counterclaim. The said order was made pursuant to the respondent's summons-in-chambers, which was directed to be heard in open court. As the amount or value of the subject matter at the trial was less than $100,000 the appeal could only be brought with leave of the Supreme Court or a judge of the High Court. Leave to appeal was obtained by the appellants from the judge of the High Court but owing to a misunderstanding of the rules applicable the notice of appeal was filed out of time.

Mohamed Azmi SCJ on behalf of this court among other things dealt with the question of notice of appeal filed before leave was obtained and when referring to s 68(1)(a) of the Act and r 49(1) of the Rules of the Supreme Court 1980 said:

> But s 68(1)(a) provides that, 'No appeal shall be brought to the Supreme Court' when the amount or value of the subject matter at the trial is less than $100,000 except with leave of the Supreme Court or a judge of the High Court. Reading these two provisions together, it is explicit that leave to appeal must first be obtained before notice of appeal can validly be filed and served, although the time limited for appeal would run from the various events specified in r 56 RSC. (See *Tractors Malaysia Bhd* v *Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118.)

It is implicit in the judgment in *Sinnathamby*[3] that leave under s 68(1) was required.

It is wrong to construe 68(1)(a) as a general provision and that 68(2) deals specifically with matters in chambers. The two provisions should be read together.

The operative words in s 68(1)(a) are 'the *amount* or *value* of the subject matter of the claim'. The words 'at the trial' which appeared in s 68(1)(a) before the amendment in 1987 have been left out which restricted the scope to the amount or value of the subject matter at the trial. The present s 68(1)(a) is wider in scope and covers winding-up matters as in this case where the judgment debt which had brought the winding-up order is less than $100,000. The term 'subject matter' was dealt with in *Studham* v *Stanbridge*[4] which was an interpleader proceeding. Cave J said:

> The point raised is as to the meaning of O LA r 12 of the County Court Rules 1889. The higher scale of costs in force in the county court is threefold. Column A applies to cases where the subject-matter or the sum recovered exceeds 10*l* and does not exceed 20*l* and Col B where it exceeds 20*l* and does not exceed 50*l*, and Col C where it exceeds 50*l*. The question here is whether the claimant's costs come under Col C, as the learned county court judge has decided, or whether they do not. Rule 12 provides that in interpleader proceedings the 'subject-matter' shall mean in the case of a claimant (which is this case) 'the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged'. Now, here the county court judge has found that the amount of the value of the goods the claim to which was allowed was 51*l*, and he has adjudged 10*l* damages. Column C therefore applies because the subject-matter exceeds 50*l*.

It is clear therefore the court does not merely look at the relief sought but also considers the value of the judgment if it can be ascertained.

We uphold the preliminary objection and accordingly dismiss the appeal with costs. Deposit to the respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Low Hop Bing & Associates*; *Lim Kean Siew & Co.*

Reported by *Prof Ahmad Ibrahim*

Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal

SUPREME COURT (KUCHING) — CIVIL APPEAL NOS 02-305-1990 AND 02-336-1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND JEMURI SERJAN SCJJ
15 JUNE 1991

Land Law — Charge — Charge of land and building containing shop lots — Shot lots sold to purchasers — Agreement that individual purchasers should pay redemption sums for lots to chargee — Purchasers taking possession of shop lots — Failure of chargor to pay loan amount — Application for order of sale of land and building including shop lots sold to purchasers — Indefeasible title — Intervention of equity — Purchasers contending that circumstances were not just to grant order for sale — Sarawak Land Code (Cap 81), ss 132 & 148

In this case the appellant in SCAA 02-305-1990 and the first appellant in SCAA 02-336-1990 had charged the land and building known as Kuching Plaza to the respondent to secure the sum of $5m lent by the respondent. The building consisted of shop lots and some of them had been sold to purchasers (second to fifth appellants). It was agreed that the purchasers should pay the redemption sum for the lots bought to the respondent. The purchasers paid the redemption sums and took possession of the shop lots. Subsequently the respondent demanded payment of the sum of $1,531,858.86 and interest which remained unpaid from the first appellant. On failure of the first appellant to pay the amount claimed the respondent applied for an order of sale to include the shop lots already sold to the second to fifth appellants. The learned trial judge gave judgment for the respondent and the appellants appealed.

Held, allowing the appeals:

(1) Although the respondent claimed to have an indefeasible title to the land, this did not preclude an order for specific performance of a contract of sale by the proprietor or other instances of equity acting in personam. The power to grant an order for sale under s 148 of the Sarawak Land Code is discretionary as the court has to be satisfied that it seems just in the circumstances to make the order.

(2) The evidence in this case showed that the respondent had looked to the purchasers of the shop lots to redeem the property charged by the first appellant. The respondent itself

had collected the redemption sums from the purchasers to satisfy the charge. Therefore it cannot turn round to say that the first appellant had breached the terms of payment for the loan. These are valid circumstances the court should consider in deciding whether it would seem just for the respondent to foreclose the charge against the first appellant's land.

(3) The respondent had recognized the rights of the second and fifth appellants as purchasers of the shop lots and equitable owners of the shop lots and yet it chose to enforce the security on the charge over the rights of these appellants. Its conduct in the circumstances was plainly unconscionable.

(4) The respondent has not shown that circumstances seemed just for it to seek the order for sale and the appeals should therefore be allowed.

[Bahasa Malaysia summary

Di dalam kes ini perayu di dalam kes SCAA 02-305-1990 dan perayu pertama di dalam kes SCAA 02-336-1990 telah menggadai tanah dan bangunan yang dinamakan Kuching Plaza kepada responden untuk menjamin pembayaran pinjaman $5 juta yang diberi oleh responden. Bangunan itu mengandungi lot-lot kedai dan beberapa lot itu telah dijual kepada pembeli-pembeli (perayu kedua hingga kelima). Telah dipersetujui bahawa pembeli-pembeli itu akan membayar wang penebusan bagi lot-lot itu kepada responden. Pembeli-pembeli yang berkenaan telah pun membayar wang penebusan itu dan telah mendapat milikan lot-lot itu. Kemudiannya responden telah meminta pembayaran jumlah $1,531,858.86 dan bunga yang masih belum dibayar dari perayu pertama. Apabila perayu pertama gagal membayar apa yang diminta itu, responden telah memohon perintah jualan, termasuk lot-lot kedai yang telah dijual kepada perayu kedua hingga kelima. Hakim yang arif itu telah membenarkan tuntutan responden dan perayu-perayu telah membuat rayuan.

Diputuskan, meluluskan rayuan-rayuan itu:

(1) Sungguhpun responden mendakwa ia mempunyai hakmilik yang tak boleh disangkal, ini tidak menghalang perintah dibuat untuk pelaksanaan spesifik perjanjian jual beli oleh pemunya harta itu atau lain-lain penggunaan ekuiti 'in personam'. Kuasa memberi perintah jualan di bawah s 148 Kanun Tanah Sarawak (Bab 81) adalah kuasa budicara oleh kerana mahkamah hendaklah berpuashati bahawa adalah adil di dalam keadaan kes itu memberi perintah itu.

(2) Keterangan di dalam kes ini menunjukkan bahawa responden telah memandang kepada pembeli-pembeli lot-lot kedai itu untuk menebus harta yang digadai oleh perayu pertama. Responden sendiri telah mengutip wang penebusan dari pembeli-pembeli bagi menyelesaikan gadaian itu. Oleh kerana itu ia tidak boleh membelok dan mengatakan perayu pertama telah tidak mematuhi syarat pembayaran pinjaman itu. Ini adalah keadaan yang sah yang harus dipertimbangkan oleh mahkamah di dalam membuat keputusan sama ada adil bagi responden menghalang penebusan gadaian tanah itu.

(3) Responden telah mengakui hak-hak perayu kedua hingga kelima sebagai pembeli lot-lot kedai dan sebagai pemunya di segi ekuiti lot-lot itu. Sungguhpun demikian ia telah memilih menguatkuasakan haknya atas jaminan gadaian itu dan mengenepikan hak perayu-perayu itu. Kelakuannya di dalam keadaan itu adalah jelas tidak munasabah dan tidak patut.

(4) Responden telah tidak membuktikan keadaan-keadaan yang menunjukkan adalah adil baginya meminta perintah jualan harta itu dan oleh kerana itu rayuan-rayuan ini hendaklah dibenarkan.]

Cases referred to

1 *Tataurangi Tairuakena* v *Mua Carr* [1927] NZLR 688 (folld)
2 *Phillips* v *Martin* (1980) 11 LR (NSW) 153 (folld)
3 *Oh Hiam & Ors* v *Tham Kong* [1980] 2 MLJ 159 (folld)
4 *Temenggong Securities Ltd & Anor* v *Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (refd)
5 *Lian Keow Sdn Bhd (In Liquidation) & Anor* v *Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (refd)
6 *Chua Hee Hung & Ors* v *QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 (refd)
7 *Public Finance Bhd* v *Narayanasamy* [1971] 2 MLJ 32 (refd)

Legislation referred to

Sarawak Land Code ss 132, 148

Appeal from: Originating Summons KG 226 of 1987 (High Court, Kuching)

Cheng Yi for the first respondent.
David LK Sio and *Earnest Chua* for the second to fifth appellants.
Walter Dior for the respondent.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): The chargor, the first appellant in SCCA 02-336-90 (hereinafter referred to as 'the first appellant') and the four interveners who were purchasers (hereinafter referred to as 'the second to fifth appellants') of shop lots in the charged land comprising a building known as Kuching Plaza appealed against the order for sale granted to Bank Bumiputra Malaysia Bhd (hereinafter referred to as 'the respondent') by the learned judge under s 148(2)(c) of the Sarawak Land Code (Cap 81). Both of these appeals were consolidated at the hearing.

The facts relevant to the issue in both the appeals are as follows. The first appellant borrowed a sum of $5m from the respondent, at its Kuching Branch in 1979 to build the Kuching Plaza ('the Plaza'), on lot 16 section 30, Kuching Town Land District on the term that the land was to be secured by way of first legal charge for the loan. The memorandum of charge was duly executed and registered as Instrument No L 10145/1979 on 10 October 1979.

The term of payment of the loan stipulated by the respondent was that the redemption of title would be at $40,000 per shop lot calculated on the basis of $5m divided by 128 shop lots to be sold by the first appellant. It was also a condition stipulated by the respondent that in the absence of strata titles to the shop lots a request for release of loans to individual purchasers would be construed as a request for the discharge of title and that the redemption of $40,000 per title would then apply.

The basis of the building approval of the Plaza by the state government to the first appellant was that strata titles would be issued by the Land Office only upon completion of all the three phases of the building, the shopping centre, the podium and a tower block. In 1979 only the shopping centre has been completed and between that date to 1985 some 122 lots in the shopping centre had been sold to various purchasers. The second to fifth appellants were among them.

The second appellant purchased two shops, lots 143 and 144 on 19 August 1983. He obtained a loan from the Bank of Commerce Sdn Bhd. By an arrangement with the respondent, the bank on 6 October 1983 released the redemption sum of $80,000 direct to the respondent for the two shop lots on behalf of the second appellant. Consequently, the respondent issued a letter of undertaking that the strata titles for the two lots would be released to the Bank of Commerce.

The third, fourth and fifth appellants together purchased one shop lot No 236 on 13 October 1980. They obtained a loan from the respondent in the sum of $109,900. On 19 May 1981 the third to fifth appellants requested the respondent to release the redemption sum of $40,000 from the loan for the discharge of the shop lot from the main charge in accordance with the respondent's stipulation. By 28 December 1983, the whole loan was settled by the third to fifth appellants.

It is not disputed that the second to fifth appellants have been in possession of these shop lots since their purchase.

On 14 January 1987, the respondent contended that the loan remained unpaid by the first appellant was $1,531,858.86 with interest chargeable at 14.75% per annum. The respondent demanded payment from the first appellant but there was no reply.

On 31 March 1987 upon statutory notice served on the first appellant the respondent applied for order for sale. The sale was to include the shop lots already sold to the second to fifth appellants.

The learned judge dealt with the issue by determining on the indefeasible interest of the respondent on the charged land as registered proprietor as provided in s 132 of Sarawak Land Code. Referring to the section in his judgment the learned judge states:

> However, it is clearly established in law that upon registration of a charge the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. (*See Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors* [1983] 1 MLJ 81.) No doubt *Tai Lee*'s case is in respect of the provisions of the National Land Code 1965 whereas over here we have the Sarawak Land Code but an examination of the wordings of s 132 of the Land Code (Cap 81) and s 340 of the National Land Code 1965 though they are not the same, in my view, the legal effect cannot be said to be different.

And he held that:

> As actual fraud is not established in this case there is nothing to prevent the plaintiff from obtaining an order of the court for sale.

In this appeal it was argued on behalf of the appellants that the respondent by its own stipulation and conduct had looked to the purchasers to redeem the property charged and not the first appellant. They contended that none of them had denied or challenged the indefeasible title of the respondent in the charged property. They urged that on the evidence, the circumstances were not just to grant an order for sale as provided in s 148 of the Sarawak Land Code.

The respondent on the other hand argued that the second and fifth appellants had alleged fraud against the respondent whereby the issue of indefeasibility of title would become relevant and material to the respondent's case.

We have examined the evidence ourselves and we find that the appellants in their affidavits do not appear to challenge the validity of the charge created in favour of the respondent that calls upon the learned judge to decide on the indefeasible interest of the respondent. These affidavits deposed to the facts of their transactions with the respondent and contentions by the deponents that the respondent had reneged on its bargain which was not disclosed to the court when the application for sale was made.

On the argument by the respondent that the doctrine of indefeasibility can be raised as a defence, the authorities seemed to be to the contrary.

In New Zealand, the court there held as well settled that a registered proprietor who has himself entered into a contract for sale of land cannot set up the indefeasibility of his title as a defence to an action for specific performance of a contract. Skerrett CJ in delivering judgment of the court in *Tataurangi Tairuakena* v *Mua Carr*[1] observed at p 702:

> The provisions of the Land Transfer Act as to *indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations* under trusts *created by him* or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest. (Emphasis supplied.)

In Australia, the NSW court would uphold as against a registered proprietor unregistered equitable interest created by himself. Darley CJ in *Phillips* v *Martin*[2] said:

> The court will accordingly *uphold, as against a registered proprietor, unregistered equitable interests created by himself.* Thus, if A, a registered proprietor, contracts to sell his land to X, he cannot repudiate the contract on the ground that the Act gives him an indefeasible title. 'It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere

to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts'. (Emphasis supplied.)

Oh Hiam & Ors v *Tham Kong*[3] is our authority to say that our court would hold that the indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. Lord Russell of Killowen in delivering judgment of the court said:

It was contended by the defendant that this means what it says: he being on the register his title is indefeasible and accordingly the court cannot take it away from him, since it was neither alleged nor proved that there was fraud or misrepresentation to which he was a party, nor that his registration was obtained by forgery or by means of an insufficient or void instrument.

Apart from authority their *Lordships would not expect that the intervention of equity by a remedy in personam based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions.*

And further he continued:

The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. All these are instances of equity acting in personam, and indeed the order in the instant case may be described as an order in personam that the registered proprietor should defeat his own title.

There was moreover a number of authorities which deny to the Torrens system the effect for which the defendant contends, where there is not merely a question of competitive claims to the title, but a relationship between the parties justifying intervention by equity acting in personam. (Emphasis supplied.)

Now s 148 of the Sarawak Land Code (Cap 81) dealing with order of sale provides:

(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court —

...

(c) for the sale of the charged land.

and *the court after hearing the evidence may make such order as in the circumstances seems just.* (Emphasis supplied.)

It is common ground that the power to grant the order for sale under the section is discretionary.

The phrase 'circumstances seems just' would seem to raise the question what the circumstances existing are that would make the order for sale not seem just.

Two sets of circumstances were in existence when the respondent sought to foreclose on the security in the charged property. Firstly, its legal relationship as chargee with the first appellant as chargor and secondly, the circumstances governing the sale of shop lots in the charged property to the second to fifth appellants.

First as regards the relationship between the first appellant, the chargor, and the respondent, the chargee, it is pertinent to consider the relevant term of repayment of the loan stipulated by the respondent in its letter of 24 July 1979, reproduced below:

7 Repayment:

(a) Bridging Finance

To be settled completely within two (2) years. Redemption of title shall be on the basis of M$5 million divided by 128 shoplots = M$39,062.50 rounded to *M$40,000 per shop lot.* In the event that the account was in excess when release of title is required, all the excesses must first have been settled.

(b) End Finance

...

NB:
Request for release of end-finance for individual loanees in the absence of strata titles shall be construed as a request for discharge of title. Redemption sum of M$40,000 per title is then applicable.

This term of repayment stipulated by the respondent itself seemed crucial to the respondent's case. It seems to be the term of its contract that payment for the redemption of title of the charged property were to be derived from the sale of the 128 shop lots at the Plaza and not from the first appellant. And as further indicated in the footnote of the letter, the redemption sum of $40,000 per shop lot sold, was to be paid by the purchasers directly to the respondent and not the first appellant.

This is made clear from the respondent's solicitor's letter of 19 May 1981 showing that the respondent dealt directly with the third to fifth appellants when it collected $40,000 as redemption sum for the charged property.

The affidavit of the director of the first appellant company, Datuk Sim Kheng Lung, deposed to the fact that of the 116 shops lots in Kuching Plaza sold, the respondent dealt in a similar manner with the purchasers in respect of the redemption sum collected by the respondent.

The inevitable conclusion which can be deduced from these evidence is that the respondent had looked towards the purchasers of these shop lots to redeem the property charged by the first appellant. The evidence shows that the respondent itself had collected the redemption sums from those purchasers to satisfy the charge. Therefore it cannot now turn around to say that the first appellant had breached the term of payment for the loan. These, in our view, are valid circumstances the court should consider whether it would seem just for

the respondent to foreclose the charge in the first appellant's hand.

Secondly, the circumstances governing the relationship between the respondent and the purchasers:

Purchaser of lot 236

It is observed that the respondent's solicitor Loke King & Co had acted as common solicitor to the third to fifth appellants in relation to the loan facility for the purchase of shop lot 236 granted by the respondent. This is evidenced by the solicitor's bill of 27 February 1984 claiming for its professional services rendered to the third to fifth appellants.

One of the letters written by the solicitor relating to the loan referred to the release of the redemption sum to the respondent for the discharge of lot 236 from the charge. It is relevant to reproduce the letter as hereunder:

> Loke King & Company Advocates
>
> KCK/B472/81
> FL/MC/81/1
>
> 19 May 1981
>
> The Manager
> Bank Bumiputra Malaysia Bhd
> Kuching
>
> Dear Sir
>
> Re: Deed of Assignment & Loan Agreement — Private Lot 236 of Kuching Plaza Sdn Bhd — Lim Tohia Joo, Dennis Lim Ngian Seng @ Lim Chan Choon & Michael Lim Nyang Tak — Loan of $109,900.
>
> We refer to your letter dated 13 May 1981.
>
> We wish to advise that we have presented copies of Loan Agreement and Deed of Assignment to the Office of Hire Purchase Agreements, Kuching for registration. A copy each of the said documents will be forwarded to you after registration. We further wish to advise that the said documents are registrable upon presentation.
>
> You may proceed to disburse the fund.
>
> We note that *request for release of fund* for this individual loanee in the absence of Strata Title *shall operate and* be construed as a request for *discharge* of *shop lot 236* from *Charge Instrument No L 10145/79.* Redemption sum of $40,000 per shop lot is applicable. (Your letter OD/FL/MC/G/79 dated 30 July 1979 to us refers). (Emphasis supplied.)
>
> Yours faithfully,
> sgd
>
> cc The Director
> Kuching Plaza Sdn Bhd
> Kuching
>
> The Deputy General Manager
> Credit Administration Dept
> (Follow-up)
> Bank Bumiputra Malaysia Bhd
> 21 Jalan Melaka
> Kuala Lumpur.

Having in fact received the redemption sum and later the full purchase price for the shop lot 236, the respondent had in our view created an equitable estate carved out from the main charge in favour of the third to fifth appellants in respect of the shop lot purchased by them.

Purchaser of lots 143 & 144

The second appellant obtained a loan from a different source, the Bank of Commerce Bhd, for the purchase of shop lots 143 and 144. But having received the redemption sum of $80,000 for the two shop lots, the respondent issued a deed of undertaking to the Bank of Commerce Bhd. The relevant parts of the deed dated 5 October 1983 are these:

> And Whereas by a Memorandum of Charge registered as Instrument No L 10145/79 on the 10th day of October, 1979, at the Kuching Land Registry Office, the Vendor charged the said land in favour of the Bank in consideration of a loan for M$5,000,000 (Malaysian Ringgit Five Million only).
>
> And Whereas the Vendor and the Purchaser have entered into two agreements dated the 19th day of August, 1983, for the sale by the Vendor to the Purchaser of the shop spaces numbered as Private Lots No 143 and 144 in the site plan attached hereto and bordered red (hereinafter referred to as 'the said shops') being part of all the building erected on all that parcel of land situate at McDougall Road, Kuching, Sarawak, containing an area of 1.394 acres more or less and described as Lot 16 Section 30 Kuching Town Land District (as more particularly set out in the plan attached hereto), in the sum of Malaysian Ringgit Three hundred and sixty thousand only (M$360,000) (hereinafter referred to as 'the purchase price').
>
> And Whereas the parties hereto are all desirous of *arranging for the direct payment* by the Lender *to the Bank* of Malaysian Ringgit Eighty Thousand Only (M$80,000) *being the redemption sum due for the said shops.* (Emphasis supplied)
>
> Now It Is Hereby Agreed as follows:
>
> 1 In consideration of the Lender whenever making payment to the Bank of the said sum of Malaysian Ringgit Eighty Thousand Only (M$80,000) for the redemption of the said shops the Bank doth hereby agree and undertake to release to the Lender the documents of Strata Title to the said shops within two (2) weeks from the date of receipt of the same from the Land and Survey Department, Kuching.

The important aspect of this deed is the respondent's recognition of the rights of each party to the document. What we are concerned for the moment in respect of the deed, is the respondent's acknowledgment of the redemption sum from the second appellant and its recognition of the second appellant's equitable estate to the charged property. Obviously upon settlement of the full purchase price by the Bank of Commerce to the respondent, it obliges the respondent to exclude the two shop lots from the order for sale.

The existence of an equitable estate has been recognized by our court in circumstances where the purchaser in a sale and purchase agreement has paid the full purchase price and has taken possession of the property.

In *Temenggong Securities Ltd & Anor* v *Registrar of Titles, Johore & Ors*,[4] Ong Hock Sim FJ said at p 47:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands...

And further he said:

> We are in agreement with the majority view in *Karuppiah Chettiar* v *Subramaniam* where it was held: (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent, who was the equitable owner;...

In *Lian Keow Sdn Bhd (In Liquidation) & Anor* v *Overseas Credit Finance (M) Sdn Bhd & Ors*,[5] Syed Agil Barakbah SCJ in distinguishing the registered interest in the National Land Code 1965 and the equitable interest land observed at p 463:

> It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interest in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right in personam, ie he acquires the right to the land as against the vendor personally but not good against the whole world...

And in a very recent case *Chua Hee Hung* v *QBE Supreme Insurance Bhd*,[6] Lee Hun Hoe CJ (Borneo), entertaining the same view, said:

> In our case, it is not the caveat which confers on the purchaser a better claim but the prior equitable interest which the purchaser obtains under the contract of sale. This equitable interest is not lost by the fact that the appellants delayed in registering their interest...

Ong CJ (Malaya) in *Public Finance Bhd* v *Narayanasamy*[7] called this equitable estate as the purchasers' incohate rights against the respondent and said that the sub-purchasers had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued. The relevant part of the judgment is as hereunder reproduced:

> It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the court. We have no doubt whatever in our minds that they are entitled to a decree of specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued.

And further:

> The simple answer is that the appellants were aware of their incohate rights against the respondent and that completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellants applied for an order of sale the three sub-purchasers were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognized.

In the present case the respondent had recognized the rights of the second to fifth appellants as purchasers and equitable owners of the shop lots and yet it chose to enforce the security on the charge over the rights of these appellants. Its conduct in the circumstances was plainly unconscionable.

It is in our judgment established by the authorities that the respondent has not shown that circumstances seemed just for him to seek the order for sale. In the result both these appeals are allowed with costs to the appellants. Deposits to be refunded to the parties concerned.

Appeals allowed.

Solicitors: *Matthew TK Chan & Co*; *Earnest Chua & Co*; *Dior & Co.*

Reported by *Prof Ahmad Ibrahim*